No. 82-632

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,

Petitioners,

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, *et al.*, AND PAN AMERICAN WORLD AIRWAYS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC.

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December 13, 1982

QUESTION PRESENTED

Whether the decision of the Department of Defense to convert a commercial or industrial type function performed by civilian employees of the Department of Defense to one performed by a private contractor, reached after compliance with the procedural requirements of the 1980 Department of Defense Authorization Act (Pub.L. No. 96-107), is committed to agency discretion by law and, therefore, not subject to judicial review.*

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*The following is a list of all parent companies, subsidiaries and affiliates of respondent Pan American World Airways, Inc.:

Acerias Paz del Rio, S.A.
Aeronautical Radio, Inc.
Aeronautical Radio of Thailand, Ltd.
Agropecuaria Fluminense, S.A.
Air Cargo, Inc.
Air Carrier Supply, Inc.
Airline Tariff Publishing Co.
Ariana Afghan Airlines, Ltd.
Companhia Hoteleira Novos Horizontes, S.A.
Delsud Inversora, S.R.L.
Escola Americana de Rio de Janeiro
Hadrian, Ltd.
Honolulu Fueling Facilities Corp.
International Aeradio (Caribbean) Ltd.
International Aeradio Ltd. – London
Liberian Development Corp.
Manhattan Air Terminal, Inc.
Middle East Real Estate Co., S.A.L.
New York Airways, Inc.
Pan American Airways de Mexico, S.A.
Pan American World Services, Inc.
Pan Am Asset Management, Inc.
Pan Am Thrift Way, Ltd.
Pan American World Airways (South Africa)
PTY Ltd.
Portland Fueling Facilities Corp.
Private Investment Company for Asia, S.A.
Promotora de Hoteles de Turiamo Medellin, S.A.
Radio Aeronautica Paraguaya, S.A.
Social Immobiliaria Norteamerica, S.A.
Societe International de Telecommunications Aeronautiques

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CASPAR WEINBERGER, SECRETARY OF DEFENSE, *et al.*, AND PAN AMERICAN WORLD AIRWAYS, INC.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC.

STATEMENT OF THE CASE

It has been the general policy of the federal government for a number of years to rely upon private enterprise to supply the products and services it needs except in circumstances in which in-house production or performance is determined to be more cost-effective. This policy is currently reflected in Office of Management and Budget ("OMB") Circular A-76, 44 *Fed. Reg.* 20556 (April 5, 1979), *revised*, 45 *Fed. Reg.* 69322 (October 20, 1980), which sets forth detailed guidelines for determining when to contract out work performed by government employees. Certain of these guidelines were in turn elevated to the status of law by virtue of section 806(a) of the Department of Defense Authorization Act, 1980.[1]

[1] Pub.L. No. 96-107, 93 Stat. 813 (1979). The pertinent portions of section 806(a) are set forth at n. 4 of the petition for certiorari, Pet. at 2 n. 4, and at n. 6 of the decision of the court of appeals in this case, attached as Appendix A to the petition, Pet. App. at 3a n. 6. References

This case arose from the decision in June 1980 by the Department of Defense to contract with respondent Pan American World Airways, Inc. ("Pan Am") to perform certain support functions formerly performed by civilian Army employees at Fort Gordon, Georgia. Petitioners American Federation of Government Employees, Local 2017, and three former employees (collectively, "AFGE") filed suit to block the conversion, alleging that the Department of Defense's decision to contract out had been made in violation of section 806(a) of Pub. L. No. 96-107. AFGE's suit was dismissed by the district court for lack of jurisdiction and standing (Pet. App. at 10a). The district court's jurisdictional holding was affirmed by the court of appeals, which held that the decision to contract out is committed to agency discretion by law, within the meaning of 5 U.S.C. § 701(a)(2), and therefore not subject to judicial review. *AFGE, Local 2017* v. *Brown*, 680 F.2d 722 (11th Cir. 1982). AFGE now seeks a writ of certiorari to review the decisions of the courts below.

The statement of the case presented in AFGE's petition for certiorari is accurate as far as it goes, but is strikingly silent as to the facts relevant to AFGE's substantive claims against the government – *i.e.*, the actions taken by the Department of Defense to comply with section 806(a). These facts, which the district court found to be undisputed (Pet. App. at 12a-13a) and which are not contested in AFGE's petition, were set forth in detail in the opinion of the court of appeals:

> . . . Prior to making the contracting out decision the Army conducted an analysis of the functions to determine whether a cost savings could in fact be achieved by conversion to a private contractor. As a part of this analysis the Army first performed a study to determine the most efficient and cost-effective organization for in-house performance of these functions. The Army then solicited and received cost proposals

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in this brief to the petition for certiorari will be made in the form, "Pet. at ____." References to the appendices to the petition will be made as "Pet. App. at ____."

> from private contractors for the performance of the functions. The cost proposal offered by Pan Am was determined to be the lowest of all the contractors. The Army compared Pan Am's cost proposal with the cost calculation for in-house performance and determined that an estimated 58-month savings of approximately $32 million could be achieved by contracting with Pan Am for the performance of the functions.
>
> The results of the Army's study were reported to Congress, including a certification that the Army's in-house cost calculation for the functions was based on an estimate of the most efficient and cost-effective organization for in-house performance. The Army's tentative decision to contract out to Pan Am was also reported to Congress. Congress raised no objections to the in-house cost calculations or to the decision to contract out.

680 F.2d at 724-25 (Pet. App. at 4a). Against this background, it is clear that this case does not present the question of whether *any* judicial review of a conversion decision may be had. Rather, the issue decided below was whether, the procedural requirements of section 806(a) having been satisfied, judicial review may be had of the substantive decision to contract out.

SUMMARY OF ARGUMENT

AFGE's contention that a "conflict in principle" exists between the decision below and *Citizens to Preserve Overton Park* v. *Volpe*[2] is simply incorrect. In holding that conversion decisions are committed to agency discretion by law, within the meaning of 5 U.S.C. § 701(a)(2), the court of appeals examined both the language of section 806 and the nature of the agency decision involved. This analysis is fully consistent

[2] 401 U.S. 402 (1971).

with prior decisions of this Court, including *Citizens to Preserve Overton Park* v. *Volpe*, and is indistinguishable from the analysis conducted in numerous decisions by other courts of appeals. Moreover, the decision below was obviously correct, as confirmed by the uniform holdings of other courts that military conversion decisions are not judicially reviewable and by legislative events both before and after enactment of section 806.

Nor does this case present an important issue of law which should be decided by this Court. The federal policy in favor of contracting out has been in existence for nearly three decades, and literally thousands of conversion decisions have been made during that time. The issue decided below was thus hardly novel, nor was it difficult. The court of appeals applied well established, "garden variety" principles in an obviously correct manner. No reason exists, and certainly AFGE has stated none, for this Court to review that decision.

ARGUMENT

AFGE has asserted two grounds in support of issuance of a writ of certiorari in this case – that the court of appeals' interpretation of 5 U.S.C. § 701(a)(2) "conflicts in principle" with this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe* and that an important issue of law is presented which should be decided by this Court. Neither contention has merit.

1. To draw a conflict between the decision below and *Citizens to preserve Overton Park*, AFGE characterizes (a) the court of appeals' decision as having applied a test which looks only to the nature of the agency decision involved and (b) the decision in *Citizens to Preserve Overton Park* as having established that a court may examine only the language of the statute at issue. (Pet. at 6.) Neither characterization is accurate.

First, the court of appeals explicitly stated that the determination of whether agency action is committed to discretion by law requires "an evaluation of the legislative scheme as well as the practical and policy implications [of judicial

review]."[3] That is, the court of appeals held that an examination of *both* the statute and the agency decision involved is required, and its opinion bears out that it examined both factors.[4] AFGE's contrary assertion is simply false.

Second, the Court in *Citizens to Preserve Overton Park* held only that the proper inquiry under 5 U.S.C. § 701(a)(2) is whether "there is no law to apply."[5] The Court did not hold that in conducting that inquiry, a court may not look to the nature of the agency decision involved, as evidenced by the fact that, in determining whether particular decisions were committed to agency discretion by law, this Court in numerous decisions has itself examined the nature of the decision as well as the potential impact of judicial review on the administrative process.[6]

Indeed, in many cases it is difficult to conceive how a court could determine whether "there is law to apply" without examining the agency action to which the law is to be applied. As the United States Court of Appeals for the District of Columbia Circuit has emphasized:

> In practice, the determination of whether there is "law" to apply necessarily turns on

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[3] 680 F.2d at 725 (Pet. App. at 6a), quoting from *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981).

[4] Thus, for example, the court of appeals stated that "[w]e agree with the finding of the District Court that Section 806 vests the Army with broad discretion . . . and provides no legal standard for the court to apply." 680 F.2d at 726; Pet. App. at 7a. The court continued:

> [T]he District Court in the case at hand concluded correctly that because Section 806 lacked discernible guidelines "a District Judge would have no law to apply in determining whether or not a decision made by the agency was correct." *AFGE, Local 2017* at 11-12.

680 F.2d at 726; Pet. App. at 8a.

[5] *Citizens to Preserve Overton Park, supra*, 401 U.S. at 410.

[6] *See, e.g., Southern R. Co.* v. *Seaboard Milling Corp.*, 442 U.S. 444, 456-57 (1979); *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *Schilling* v. *Rogers*, 363 U.S. 666, 674-75 (1960).

> pragmatic considerations as to whether an agency determination is the proper subject of review. . . . In making this determination, we first identify as precisely as possible the aspects of the agency's action against which challenge is brought. We then evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review.[7]

Accordingly, the courts of appeals, including those circuits cited by AFGE for the contrary proposition (Pet. at 6 n.14), have uniformly held it proper to weigh pragmatic considerations of the sort identified by the court below in determining whether judicial review is precluded by 5 U.S.C. § 701(a)(2).[8] The "conflict in principle" alleged by AFGE between the decision below and *Citizens to Preserve Overton Park* is thus nonexistent.

Moreover, the court of appeals' application of these established principles was obviously correct. The court's holding

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[7] *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1043-44 (D.C. Cir. 1979) (citations omitted). Professor Davis cites this decision approvingly as reflecting the trend of the cases. Davis, *Administrative Law Treatise*, § 28.16-1 at 512 (1982 Supp.).

[8] *See, e.g., Rank* v. *Nimmo*, 677 F.2d 682, 700 (9th Cir. 1982); *Gifford* v. *SBA*, 626 F.2d 85, 87 (9th Cir. 1980); *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Sinai Hospital of Baltimore, Inc.* v. *Horvitz*, 621 F.2d 1267, 1270 (4th Cir. 1980); *NRDC* v. *SEC, supra; Board of Trade of Chicago* v. *CFTC*, 605 F.2d 1016 (7th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 578-79 (3rd Cir. 1979); *Davis Associates, Inc.* v. *HUD*, 498 F.2d 385, 390 (1st Cir. 1974); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970); *Kletschka* v. *Driver*, 411 F.2d 436, 443 (2d Cir. 1969). *See also*, Davis, *Administrative Law of the Seventies*, § 28.16-1 at 641 (1976).

that the Army's conversion decision was nonreviewable rested on four conclusions – (1) that Congress' purpose in enacting section 806(a) was to provide for increased congressional oversight of conversion decisions and not to create a private cause of action for government employees dissatisfied with such decisions; (2) that the express language of section 806(a) provides no discernible guidelines to apply in determining the correctness of a conversion decision; (3) that the Army's decision to contract out involves military and managerial choices inherently unsuitable for judicial consideration; and (4) that the decision is based upon considerations of efficiency and cost-effectiveness best resolved by application of the special expertise of the Army officials involved.[9]

In this respect, the court of appeals' decision was consistent with, and relied upon, a uniform line of cases holding that Department of Defense conversion decisions under the substantially more detailed guidelines of OMB Circular A-76 are committed to agency discretion.[10] The court of appeals'

[9] 680 F.2d at 726-27; Pet. App. at 7a-9a.

[10] See cases cited at 680 F.2d at 726; Pet. App. at 7a-8a. AFGE's suggestion that the court of appeals erred in relying upon these cases (Pet. at 7-8 n. 18) is simply incorrect. As the court of appeals noted (680 F.2d at 726; Pet. App. at 7a), section 806(a) imposed no new standards, policy objectives, goals or guidelines for contracting out not already set forth in OMB Circular A-76. The prohibition on conversion for the purpose of circumventing personnel ceilings set forth in section 806(a)(1), for example, is contained in OMB Circular A-76, paras. 6 and 8. Similarly, each element of the certification and report required under section 806(a)(2)(A) is also required to be prepared under the OMB Circular. The only change occasioned by section 806 was the requirement of prior notification, reporting, and certification to Congress. Indeed, OMB Circular A-76 is far more detailed than section 806. The cases relied upon by the court of appeals which have held that A-76 provides inadequate criteria for judicial review thus apply with even more force to section 806. AFGE's additional argument that these decisions are distinguishable since the OMB Circular is an internal executive branch management tool, while section 806 is a statute, also fails. Although that fact might provide an additional ground for sustaining the A-76 decisions, it was not the basis of those decisions, which rested upon the unavailability of adequate standards to guide judicial review. *See, e.g., Local 2855, AFGE* v. *United States*, 602 F.2d 574, 579-83 (3rd Cir. 1979). The rationale of the cases decided under the OMB Circular is thus fully applicable to cases brought under section 806.

decision also derives substantial support from the fact, not mentioned in the court's opinion but addressed in the briefs below, that Congress was aware of the cases holding conversion decisions unreviewable when it adopted section 806(a) but made no provision to alter that result.[11] More importantly, the following year, a provision which would have authorized judicial review of conversion decisions passed the House but was deleted in conference.[12] These events suggest strongly that section 806 was not intended to overrule settled law holding that military conversion decisions are not subject to judicial review.

2. In support of its second ground for granting certiorari, that the case involves an important issue of law which should be settled by the Court, AFGE has asserted only that the rights of thousands of Department of Defense civilian workers to obtain judicial review of conversion decisions are at stake. (Pet. at 12-13.) AFGE's petition, however, sets forth no reasons why guidance from this Court is "crucial." In view of the fact that the decision below was consistent, both in principle and in substance, with prior decisions of this Court and other courts of appeals, Pan Am respectfully suggests that

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[11] *See, e.g.*, 125 *Cong. Rec.* H7913 (daily ed. Sept. 14, 1979) (remarks of Rep. Harris).

[12] As noted in AFGE's petition (Pet. at 12-13), section 502 of the Department of Defense Authorization Act for fiscal year 1981, Pub.L. No. 96-342, 94 Stat. 1077 (1980), is substantially similar to section 806. Rep. Kazen introduced an amendment authorizing judicial review of contracting out decisions "in recognition of the fact that previously U.S. District Courts have refrained from assuming jurisdiction to review contracting out actions . . . ." 126 *Cong. Rec.* H3716 (daily ed. May 15, 1980). The amendment passed the House, but was deleted in conference. *See* H.R. Rep. No. 96-1222, 96th Cong., 2d Sess. 93, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2666, 2669. In analogous circumstances, the court in *Lloyd A. Fry Roofing Co.* v. *EPA*, 554 F.2d 885, 890 (8th Cir. 1977), observed that "action of the Conference Committee in deleting language that would have expressly reserved the right to . . . review . . . strongly suggests that the intent of the omitted portion was rejected in the bill as passed." Similarly, this Court has previously noted the propriety of referring to subsequent legislative events to divine the original intent of Congress. *See, e.g., Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969).

no such reasons can be given. Contracting out actions have been taken for many years by the Department of Defense and other federal agencies. The issue decided below is thus neither novel nor particularly difficult.

AFGE has not demonstrated the existence of any problem deriving from the present state of the law which requires diversion of the scarce resources of this Court for solution. To the extent AFGE and the government employees it represents are unhappy with a particular conversion decision, their remedy lies with Congress, not with this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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